



State of Wisconsin
Governor Scott Walker

Department of Agriculture, Trade and Consumer Protection
Ben Brancel, Secretary

DATE: May 1, 2013

TO: Board of Agriculture, Trade and Consumer Protection

FROM: Ben Brancel, Secretary *Ben Brancel*
Sandy Chalmers, Administrator *Sandy Chalmers* Division of Trade and Consumer Protection

SUBJECT: Residential Rental Practices, Amending Ch. ATCP 134, WI Admin. Code
Final Draft Rule

PRESENTED BY: Michelle Reinen

REQUESTED ACTION:

At the May 14, 2013 Board meeting, the Department of Agriculture, Trade and Consumer Protection (DATCP) will ask the DATCP Board to authorize a final draft of a proposed rule (copy attached) to amend ch. ATCP 134 related to residential rental practices. This rule aligns certain provision in the existing Ch. ATCP 134 with some provisions in Ch. 704 (Landlord and Tenant) recently created in 2011 Wisconsin Act 143.

SUMMARY:

Background

The department enacted ch. ATCP 134, Wis. Adm. Code, ("the existing rule") in 1980 and the rule was revised in 1998. The current rule regulates rental transactions between landlords and residential tenants as follows:

- Requires disclosure of rental agreement and earnest money receipts to the tenant.
- Requires disclosures to tenant prior to lease relating to the identity of the landlord, conditions affecting habitability, and utility charges.
- Prescribes procedures for accepting and withholding earnest money fees and credit check fees.
- Prescribes procedures for handling security deposits.
- Prescribes procedures for promises to repair.
- Prohibits a landlord from including in rental agreements provisions that do the following:
 - Authorize unlawful eviction.
 - Accelerate rent payments in event of tenant default.
 - Require the tenant to pay attorney's fees.
 - Authorize the landlord to confess judgment against the tenant.

Agriculture generates \$59 billion for Wisconsin

- Relieve the landlord from liability for property damage or personal injury caused by the landlord.
 - Impose liability on the tenant for property damage or personal injury not caused by the tenant.
 - Waive statutory or legal obligations of the landlord.
- Prohibits a landlord from:
 - Advertising or renting condemned premises.
 - Unauthorized entries.
 - Automatically renewing a lease without notice.
 - Unlawfully confiscating personal property.
 - Engaging in retaliatory or self-help eviction.
 - Charging late rental fees and other penalties not set out in the lease.
 - Misrepresenting the dwelling units offered or the amount of all rent and non-rent charges.
 - Failing to disclose all non-rent charges in connection with the representation of any rent amount.

Rule Content

The Wisconsin legislature enacted Act 143 on March 21, 2012. Act 143 made changes to ch. 704, Stats., that affect some of the provisions of the current rule relating to:

- Disclosures required before entering into a rental agreement.
- Returning security deposits.
- Withholding security deposits.
- Prohibiting certain rental agreement provisions.
- Confiscating personal property left behind by a tenant.
- Violations of Landlord Tenant law may constitute a violation of Unfair Trade Practices Law.

As a result of Act 143, some provisions of the existing rule overlap and conflict with Ch. 704. This rule would modify the current rule to conform to the new statutory requirements.

Disclosures required before entering into a rental agreement

The current rule requires certain disclosures a landlord must make to the tenant before entering into a rental agreement with, or accepting any earnest money or security deposit from, a prospective tenant. These disclosures relate to conditions affecting habitability.

Act 143 creates s. 704.07 (2) (bm), Stats., which requires disclosures relating to habitability that are similar, but not identical, to the disclosures prescribed by the current rule.

This rule repeals and recreates the required disclosures to make them identical to the disclosures required by statute.

Returning security deposits

Under the current rule, if the tenant surrenders the property before the last day of the rental agreement, the landlord must return the security deposit within 21 days after the landlord receives a written notice from the tenant that the tenant has surrendered the premises.

Act 143 creates s. 704.28 (4) (b), Stats., which requires the landlord, if the tenant surrenders the property before the last day of the rental agreement, to return the security deposit within 21 days after the last day of the rental agreement.

This rule amends the requirement to a return a security deposit to be identical to the provision in the Act.

Withholding security deposits

Under the current rule, a landlord may withhold a tenant's security deposit only for specific reasons listed in the rule such as damage to the premises; unpaid rent; unpaid utilities or assessments that the landlord is liable for unpaid amounts; or other reasons specifically listed in the rental agreement as "nonstandard rental provisions."

Act 143 creates s. 704.28 (1), Stats., which incorporates very similar (but not identical) provisions into the statute.

This rule makes minor changes to the wording of the provisions relating to withholding a tenant's security deposit to conform with Act 143, but does not substantially change the requirements from the current rule. It also makes slight changes related to "nonstandard rental provisions" to conform to s. 704.28 (2), as created by Act 143.

Prohibited rental agreement provisions

The current rule describes provisions that a landlord is prohibited from placing in a rental agreement, such as:

- Authorizing eviction by other than judicial procedure.
- Acceleration of rent payments if tenant breaches obligations.
- Requiring the tenant to pay landlord's attorney's fees in the event of a dispute.
- Relieving the landlord from liability for damage or injury caused by negligent acts or omissions of the landlord.
- Imposing liability on the tenant for personal injury arising from causes clearly beyond the tenant's control.

Act 143 creates portions of s. 704.44, Stats., which describe prohibited rental agreement provisions that are similar, but not identical, to provisions in the current rule. In addition, Act 143 creates two prohibited rental agreement provisions – allowing the landlord to do certain things because a tenant contacted law enforcement, health, or safety services; or allowing the

landlord to terminate the tenancy if a crime is committed on the rental property – that are not included in the current rule’s prohibited rental agreement provisions. Further, Act 143 states that the entire rental agreement is void and unenforceable if it contains any of the prohibited provisions. The current rule does not have such a provision, but instead relies on a test established by the courts to determine whether the entire rental agreement is void based on the inclusion of a prohibited provision.

This rule makes minor changes in wording related to prohibited rental agreement provisions so that the rule is identical to the new statute. This rule also incorporates the provision in s. 704.44, Stats., that declares the entire rental agreement is void and unenforceable if it contains any of the prohibited rental agreement provisions. This rule does not, however, incorporate the two new rental agreement provisions that were created by Act 143 [ss. 704.44 (1m) and (9), stats.] that are not in the current rule.

Confiscating personal property left behind by the tenant

The current rule prohibits the landlord from confiscating the tenant’s personal property except as authorized by law or in accordance with a written lien agreement. The current rule also prescribes the form and manner in which the landlord and tenant may execute the lien agreement.

Act 143 creates s. 704.05 (5), Stats., which allows a landlord to dispose of personal property left behind by the tenant at the landlord’s discretion as long as certain conditions are met. For example, there must not be a written agreement to the contrary, and the landlord must provide notice to the tenant of his or her intent not to store the property before the tenant enters into or renews a rental agreement.

This rule amends the current rule so that provisions relating to abandoned personal property are identical to the statute.

Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations

Federal law does not generally regulate landlord and tenant relationships or residential rental practices. The Federal Fair Housing Act of 1968 makes it illegal for a landlord to discriminate against a potential tenant because of a person’s race, sex, national origin, or religion, and it prohibits certain discriminatory conduct.

Comparison with Rules in Adjacent States

Illinois, Iowa, Michigan, and Minnesota all have statutes or administrative rules governing residential rental practices. These statutes and rules address common topics such as rental agreements, security deposits and other duties of landlords and tenants.

Summary of Factual Data and Analytical Methodologies

This rule modifies the current rule to conform to policies dictated by a change in Wisconsin statutes.

Analysis and Supporting Documents used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

DATCP anticipates that the economic impact of this rule will be minimal. This rule makes minor changes to conform to Ch. 704, Stats. This rule also makes changes to the current rule to replace requirements that are no longer enforceable because of changes in Ch. 704, Stats.

Effect on Small Business

The current rule and the proposed rule regulate transactions between landlords and tenants. Many landlords are small businesses. However, this proposed rule does not have any effect on any small business. The proposed rule does not change the duties and responsibilities of landlords in relation to their tenants. Instead, the proposed rule states the duties and responsibilities of the landlord and eliminates inconsistencies between the Ch. 704, Stats., and Ch. ATCP 134, Wis. Admin. Code.

Hearings

DATCP held a public hearing on this rule on February 22, 2013. There were no attendees at the hearing, and DATCP did not receive any written comments.

Changes from Hearing Draft

DATCP made some changes from the hearing draft rule. However, all of these changes were minor editorial or technical revisions suggested by the Rule Clearinghouse.

Next Steps

If the Board approves this final draft rule, DATCP will transmit the final draft rule for the Governor's written approval and then for legislative committee review. If the Legislature takes no action to stop the rule, the DATCP Secretary will sign the final rulemaking order and transmit it for publication. The rule will take effect on the first day of the month following publication.

**PROPOSED ORDER
OF THE WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION
ADOPTING RULES**

- 1 The Wisconsin department of agriculture, trade and consumer protection proposes the following
2 rule *to amend* ATCP 134.06 (2) (b) 1., (3) (a) (intro) and 1., 3., 4., 5., and 6., and (b) and (c),
3 134.08, and 134.09 (4) (a), and *to repeal and recreate* ATCP 134.04 (2) and 134.09 (4) (b),
4 *relating to* Residential Rental Practices.

**Analysis Prepared by the Department
of Agriculture, Trade and Consumer Protection**

Statutes Interpreted

Statutes Interpreted: ss. 100.20 (1), 704.05 (5) (bf), 704.07 (2) (bm), 704.28 (1), (2) and (4) (b), and 704.44, stats.

Statutory Authority

Statutory Authority: ss. 93.07 (1), 100.20 (2)(a), and 704.95, Stats.

Explanation of Statutory Authority

DATCP has broad general authority, under s. 93.07 (1), Stats., to interpret laws under its jurisdiction. DATCP has authority under s. 100.20 (2) (a), Stats., to promulgate administrative rules forbidding trade practices which are determined by the department to be unfair and prescribing trade practices that are determined by the department to be fair.

Section 704.95, Stats. (created by 2011 Wisconsin Act 143) provides that practices in violation of Ch. 704, Stats., may also constitute unfair trade practices or unfair methods of competition under s. 100.20, Stats. This section also restricts DATCP from promulgating rules that change any right or duty arising under Ch. 704. However, there are a number of rights and duties in the existing rule, which predates 2011 Wisconsin Act 143 (Act 143), that are similar to the new statutory requirement.

Related Statutes and Rules

Chapter 704, Stats., regulates transactions between landlords and both residential and non-residential tenants. The department does not administer ch. 704.

Chapter ATPC 125, Wis. Adm. Code regulates rental transactions for sites upon which the tenant places a mobile home owned by the tenant.

Plain Language Analysis

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prescribes the form and manner in which the landlord and tenant may execute the lien agreement.

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DATCP Contact

Questions and comments related to this rule may be directed to:

Kevin LeRoy
Department of Agriculture, Trade and Consumer Protection
P.O. Box 8911
Madison, WI 53708-8911
Telephone (608) 224-4928
E-Mail: kevin.leroy@wisconsin.gov

1 **SECTION 1.** ATCP 134.04 (2) is repealed and recreated to read:

2 **ATCP 134.04 (2) Disclosure of building or housing code violations.** A landlord shall
3 disclose to a prospective tenant, before entering into a rental agreement with, or accepting any
4 earnest money or security deposit from, the prospective tenant, any building code or housing
5 code violation to which all of the following apply:

6 (a) The landlord has actual knowledge of the violation.

7 (b) The violation affects the dwelling unit that is the subject of the prospective rental
8 agreement or a common area of the premises.

9 (c) The violation presents a significant threat to the prospective tenant's health or safety.

10 (d) The violation has not been corrected.

11 **SECTION 2.** ATCP 134.06 (2) (b) 1., (3) (a) (intro) and 1., 3., 4., 5., and 6., and (b) and (c) are
12 amended to read:

13 ATCP 134.06 (2) (b) 1. If the tenant vacates the premises before the last day of tenancy
14 ~~provided specified~~ under the rental agreement, ~~and gives the landlord written notice that the~~
15 ~~tenant has vacated, surrender occurs when the landlord receives the written notice that the tenant~~
16 ~~has vacated. If the tenant mails the notice to the landlord, the landlord is deemed to receive the~~
17 ~~notice on the second day after mailing and the landlord rerents the premises before the tenant's~~

1 rental agreement terminates, surrender occurs on the date on which the new tenant's tenancy
2 begins.

3 (3) (a) A When a landlord returns a security deposit to a tenant after the tenant vacates
4 the premises, the landlord may withhold from a tenant's the full amount of the security deposit
5 only amounts reasonably necessary to pay for any of the following:

6 1. ~~Tenant~~ Except as provided in par. (c), tenant damage, waste or neglect of the premises.

7 3. Payment ~~which~~ that the tenant owes under the rental agreement for utility service
8 provided by the landlord but not included in the rent.

9 4. Payment ~~which~~ that the tenant owes for direct utility service provided by a
10 government-owned utility, to the extent that the landlord becomes liable for the tenant's
11 nonpayment.

12 5. Unpaid ~~mobile home parking fees which a local unit of government has~~ monthly
13 municipal permit fees assessed against the tenant by a local unit of government under s. 66.0435
14 (3), Stats., to the extent that the landlord becomes liable for the tenant's nonpayment.

15 6. ~~Other reasons authorized~~ Any other payment for a reason provided in the a
16 nonstandard rental agreement according to provision document described in par. (b).

17 (b) A Except as provided in par. (c), a rental agreement may include one or more
18 nonstandard rental provisions which authorize a the landlord to withhold amounts from a the
19 tenant's security deposit for reasons not ~~identified under~~ specified in par. (a). ~~The landlord shall~~
20 ~~include the~~ Any such nonstandard rental provisions, ~~if any,~~ shall be provided to the tenant in a
21 separate written document entitled "**NONSTANDARD RENTAL PROVISIONS.**" ~~which the~~
22 ~~landlord provides to the tenant.~~ The landlord shall specifically identify and discuss each
23 nonstandard rental provision with the tenant before the tenant enters into ~~any~~ a rental agreement

1 with the landlord. If the tenant signs ~~or initials~~ a nonstandard rental provision, it is rebuttably
2 presumed that the landlord has specifically identified and discussed ~~that~~ the nonstandard rental
3 provision with the tenant, and that the tenant has agreed to it.

4 (c) This subsection does not authorize a landlord to withhold any amount from a security
5 deposit for normal wear and tear, or for other damages or losses for which the tenant cannot
6 reasonably be held responsible under applicable law.

7 **SECTION 4.** ATCP 134.08 is amended to read:

8 **ATCP 134.08 Prohibited rental agreement provisions.** ~~No~~ Notwithstanding s. 704.02,
9 Stats., a rental agreement may is void and unenforceable if it does any of the following:

10 (1) ~~Authorize~~ Authorizes the eviction or exclusion of a tenant from the premises, other
11 than by judicial eviction procedures as provided under ch. 799, Stats.

12 (2) ~~Provide~~ Provides for an acceleration of rent payments in the event of tenant default or
13 breach of obligations under the rental agreement, or otherwise purport to waive the landlord's
14 obligation to mitigate damages as provided under s. 704.29, Stats.

15 (3) ~~Require~~ Requires payment, by the tenant, of attorney's fees or costs incurred by the
16 landlord in any legal action or dispute arising under the rental agreement. This subsection does
17 not prevent the recovery of costs or attorney's fees by a landlord or tenant pursuant to a court
18 order under ch. 799 or 814, Stats.

19 (4) ~~Authorize~~ Authorizes the landlord or any agent of the landlord to confess judgment
20 against the tenant in any action arising under the rental agreement.

21 (5) ~~Relieve, or purport to relieve~~ States that the landlord from liability is not liable for
22 property damage or personal injury caused by negligent acts or omissions of the landlord. This
23 subsection does not affect ordinary maintenance obligations of a tenant under s. 704.07, Stats., or

1 assumed by a tenant under a rental agreement ~~in accordance with sub. (7) and s. 704.07, Stats or~~
2 other written agreement between the landlord and the tenant.

3 (6) ~~Impose, or purport to impose~~ Imposes liability on a tenant for any of the following:

4 (a) Personal injury arising from causes clearly beyond the tenant's control.

5 (b) Property damage caused by natural disasters, or by persons other than the tenant or
6 the tenant's guests or invitees. This paragraph does not affect ordinary maintenance obligations
7 assumed by a tenant under ~~the s. 704.07, Stats., or assumed by a tenant under a~~ rental agreement,
8 ~~in accordance with sub. (7) and s. 704.07, Stats or~~ other written agreement between the landlord
9 and the tenant.

10 (7) ~~Waive~~ Waives any statutory or other legal obligation on the part of the landlord to
11 deliver the premises in a fit or habitable condition, or to maintain the premises during the
12 tenant's tenancy.

13 **SECTION 5.** ATPC 134.09 (4) (a) is amended to read:

14 ATPC 134.09 (4) CONFISCATING PERSONAL PROPERTY. (a) No landlord may seize or
15 hold a tenant's personal property, or prevent the tenant from taking possession of the tenant's
16 personal property, except as authorized under s. 704.05 (5), Stats., or a written ~~lien~~-agreement
17 between the landlord and tenant.

18 **SECTION 6.** ATPC 134.09 (4) (b) is repealed and recreated to read:

19 (b) If the landlord does not intend to store personal property left behind by a tenant,
20 except as provided in s. 704.05 (5) (am), Stats., the landlord shall provide written notice to a
21 tenant when the tenant enters into, and when the tenant renews, a rental agreement that the
22 landlord will not store any items of personal property that the tenant leaves behind when the
23 tenant removes from the premises, except as provided in s. 704.05 (5) (am), Stats.

1

2

SECTION 7. EFFECTIVE DATE: This rule takes effect on the first day of the month

3

following publication in the Wisconsin administrative register, as provided in

4

s. 227.22(2)(intro.), Stats.

Dated this _____ day of _____, _____.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____
Ben Brancel
Secretary

Wisconsin Department of Agriculture, Trade and Consumer Protection

Final Regulatory Flexibility Analysis

Rule Subject: Residential Rental Practices
Adm. Code Reference: ATCP 134
Rules Clearinghouse #: 13-002
DATCP Docket #: 12-R-07

Rule Summary

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Small Businesses Affected

The current rule and the proposed rule regulate transactions between landlords and tenants. Many landlords are small businesses. However, this proposed rule does not have any effect on any small business. The proposed rule does not change the duties and responsibilities of landlords in relation to their tenants. Instead, the proposed rule states the duties and responsibilities of the landlord and eliminates inconsistencies between the Ch. 704, Stats., and Ch. ATCP 134, Wis. Admin. Code.

Reporting, Bookkeeping and other Procedures

The proposed rule does not create any new reporting, bookkeeping or other procedures for small businesses.

Professional Skills Required

The proposed rule does not require any new professional skills by small businesses.

Accommodation for Small Business

Many of the businesses affected by this rule are "small businesses." For the most part, this rule does not make special exceptions for "small businesses". The nature of the subject matter does not lend itself to differentiating between types of businesses.

Conclusion

This rule will not have a significant adverse effect on "small business," and is not subject to the delayed "small business" effective date provided in s. 227.22(2)(e), Stats.

DATCP will, to the maximum extent feasible, seek voluntary compliance with this rule.

Dated this 2 day of May, 2013.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By 

Sandy Chalmers, Administrator,
Division of Trade and Consumer Protection

ADMINISTRATIVE RULES FISCAL ESTIMATE AND ECONOMIC IMPACT ANALYSIS

Type of Estimate and Analysis

☒ Original ☐ Updated ☐ Corrected

Administrative Rule Chapter, Title and Number

Ch. ATCP 134, Residential Rental Practices

Subject

Residential Rental Practices

Fund Sources Affected

☒ GPR ☐ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEG-S

Chapter 20, Stats. Appropriations Affected

20.115(1)(a)

Fiscal Effect of Implementing the Rule

☒ No Fiscal Effect
☐ Indeterminate

☐ Increase Existing Revenues
☐ Decrease Existing Revenues

☐ Increase Costs
☐ Could Absorb Within Agency's Budget
☐ Decrease Costs

The Rule Will Impact the Following (Check All That Apply)

☐ State's Economy

☐ Local Government Units

☒ Specific Businesses/Sectors

☐ Public Utility Rate Payers

Would Implementation and Compliance Costs Be Greater Than \$20 million?

☐ Yes ☒ No

Policy Problem Addressed by the Rule

Ch. ATCP 134, Wis. Adm. Code, was enacted in 1980 and the rule was revised in 1998. The current rule regulates rental transactions between landlords and residential tenants as follows:

- Requires disclosure of rental agreement and earnest money receipts to the tenant.
- Requires disclosures to tenant prior to lease relating to the identity of the landlord, conditions affecting habitability, and utility charges.
- Prescribes procedures for accepting and withholding earnest money fees and credit check fees.
- Prescribes procedures for handling security deposits.
- Prescribes procedures for promises to repair.
- Prohibits a landlord from including in rental agreements provisions that do the following:
 - Authorize unlawful eviction.
 - Accelerate rent payments in event of tenant default.
 - Require the tenant to pay attorney's fees.
 - Authorize the landlord to confess judgment against the tenant.
 - Relieve the landlord from liability for property damage or personal injury caused by the landlord.
 - Impose liability on the tenant for property damage or personal injury not caused by the tenant.
 - Waive statutory or legal obligations of the landlord.
- Prohibits a landlord from:
 - Advertising or renting condemned premises.
 - Unauthorized entries.
 - Automatically renewing a lease without notice.
 - Unlawfully confiscating personal property.
 - Engaging in retaliatory or self-help eviction.
 - Charging late rental fees and other penalties not set out in the lease.

- Misrepresenting the dwelling units offered or the amount of all rent and non-rent charges.
- Failing to disclose all non-rent charges in connection with the representation of any rent amount.

Chapter 704, Stats., relating to Landlord Tenant, regulates transactions between landlords and both residential and non-residential tenants. The department does not administer ch. 704, Stats. The Wisconsin legislature enacted Act 143 on March 21, 2012 that made changes to ch. 704, Stats that also affect some provisions of current rule. This rule would modify the current rule to conform to the new statutory requirements.

Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred)

This rule makes minor changes to the existing rule and does not represent any significant shift in policy. It does not pose any significant fiscal or economic impact on specific businesses, business sectors, public utility rate payers, local governments or the state's economy as a whole.

Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule

Benefits

This rule will benefit renters and landlords. Generally, it continues policies that have been in place for a number of years.

Alternatives

The passage of Act 143 leaves no real alternative. The newly created s. 704.95, Stats., prohibits DATCP from promulgating rules that change any right or duty described in ch. 704, Stats. There are a number of provisions where the existing rule is similar, but not identical to ch. 704, Stats. If this rule is not adopted, it is questionable that those rule provisions are enforceable. This is significant because DATCP, the Department of Justice, and district attorneys have the authority to enforce ch. ATPC 134 (as an Unfair Trade Practice under s. 100.20, Stats.) but do not have authority to enforce ch. 704, Stats.

Long Range Implications of Implementing the Rule

There are no long term implications of implementing this rule. This rule modifies the current rule to conform to policies dictated by a change in Wisconsin statutes.

Compare With Approaches Being Used by Federal Government

Federal law does not generally regulate landlord and tenant relationships or residential rental practices. The Federal Fair Housing Act of 1968 makes it illegal for a landlord to discriminate against a potential tenant because of a person's race, sex, national origin, or religion, and it prohibits certain discriminatory conduct.

Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)

Illinois, Iowa, Michigan, and Minnesota all have statutes or administrative rules governing residential rental practices. These statutes and rules address common topics such as rental agreements, security deposits and other duties of landlords and tenants.

Comments Received in Response to Web Posting and DATCP Response

No comments were received in response either to the posting on the DATCP external website or the statewide administrative rules website.